SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1899.

No. 332.

F. MAY & CO., PLAINTIFFS IN ERROR,

versus

CITY OF NEW ORLEANS,

DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF LOUISIANA.

STATEMENT OF THE CASE.

F. May & Co., importers, were assessed in 1897 on "merchandise and stock in trade" at $2,500, and on "bills receivable", etc., at $1,000.

This suit was instituted in the Civil District Court for the Parish of Orleans, Louisiana, to have said assessments decreed to be unconstitutional, null and void, because their merchandise and stock in trade consisted wholly of imported goods upon which they paid the required duties to the United States, and which they sold only in the original packages, and their only "bills receivable" were sums due on account of sales of said imported

goods. For these reasons plaintiffs claim that said assessments were levied in violation of Article 1, section 10, paragraph 2, of the Constitution of the United States, which provides that "no State shall, without the consent of Congress, lay any imports or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

The City filed a general denial in answer to the petition. The judgment of the lower Court was in favor of plaintiffs and the City appealed. The Supreme Court of the State reversed the judgment and dismissed the suit, and plaintiffs brought the case up to this Honorable Court on writ of error, and made the following assignment of errors:

1. The Court erred in holding that the burden of proof is on plaintiffs, resisting the assessment and asserting exemption, to show that no part of their stock of merchandise is of the character rendering it subject to taxation, and that no portion of their credits or bills receivable were for goods sold which were subject to taxation.

2. The assessment complained of being of imports and bills receivable for imports sold, the court erred in holding that the burden of proof was not on the city of New Orleans to show that it was exempt in this case from the prohibition contained in paragraph 2, section 10, of article 1 of the Constitution of the United States.

3. The court erred in not holding that when the property assessed was shown to be imports and bills receivable for imports sold by plaintiffs the burden of proof was shifted from plaintiffs to the defendant, the City of New Orleans, to show that

it was exempt in this case from the prohibition contained in said provision of the Federal Constitution.

4. The court erred in holding that goods taken from the cases in which shipped and received by the importer, even though still remaining in the manufacturer's packages, become incorporated into the general mass of property of the State and subject to its tax laws.

5. The court erred in holding that the mere removal by plaintiffs of the manufacturer's packages from the wooden case in which a great number of them were packed merely for convenience of shipment destroyed the distinctive character as imports of the goods contained in said packages, although said packages remained intact and just as put up by the foreign manufacturer, and that after said packages were taken out of said wooden cases the goods therein contained and still unsold were no longer imports within the meaning of said provision of the Federal Constitution, but became at once subject to State and municipal taxation.

6. The court erred in holding that the case, box, or covering in which the packages put up by the manufacturer abroad were packed for shipment to plaintiffs was the original package of imports, and that as soon as the said case, box or covering was opened and the manufacturer's packages taken therefrom the goods, though yet unsold, became incorporated with the general mass of property in the State and subject to its tax laws, although the goods were never sold by the case, box, or covering in which shipped, but were sold only by the package as put up by the manufacturer, in which form they were intended to be sold.

7. The court erred in holding that the packages of goods put up by the foreign manufacturer

for use in the trade in that form and intended to be sold in that form and actually sold only in that form, in unbroken packages, were not the original packages of imports within the meaning of said provision of the Federal Constitution, when a number of said packages were put up by the foreign manufacturer in a large wooden case or box for the convenience of shipment.

8. The court erred in holding that the assessment complained of was valid, although the goods assessed and upon which plaintiffs had paid customs duties to the United States remained in the original packages as put up by the foreign manufacturer for use in the trade in that form and were intended to be sold and were sold only in that form, to-wit, in the unbroken original manufacturer's packages.

9. The court erred in holding that said imported goods were subject to State and municipal taxation while remaining in the hands of plaintiffs, the importers, in the original packages as put up by the foreign manufacturer.

10. The court erred in holding that said assessment of "bills receivable," etc., was valid, although said bills receivable consisted wholly of balances due on sales of said imported goods in the original packages as put up by the foreign manufacturer.

11. The court erred in rendering judgment herein against plaintiffs.

31 12. The court erred in rendering judgment herein in favor of defendants.

Plaintiffs are importers and deal in nothing but imported goods which they have manufactured abroad. Most of their business is done upon import orders, i. e. they take orders from samples for certain goods to be manufactured and they send

these orders to the foreign manufacturer. These goods, being already sold, are delivered immediately after their arrival to the respective purchasers and do not form a part of their stock in trade. The rest of their business consists of sales made from their stock which is composed wholly of unbroken original packages as put up at the foreign factories and which they sell only in that form and also from samples, never seeing the goods inside of the packages.

All goods are put up at the foreign factories in packages of certain kinds and sizes according to the nature of the goods and the demands of the trade; for instance, towels are put up in packages of 4 dozens to a package, and lace-edging in pasteboard boxes, each box containing a gross or 144 yards. These packages are not shipped separately by the manufacturer, but, for convenience of shipment, a number of them is put into a large wooden case. If this case contains goods for only one customer it is delivered unopened, after the payment of duties. But if it contains goods for two or more persons, then it has to be opened and the goods separated. And so a case containing goods for plaintiffs' stock is also opened and the packages are taken out. But these packages are never broken or opened, the wrapper and the twine being left intact, and no sale is ever made of a less quantity than a package.

ARGUMENT.

The first three assignments of error raise the question as to the burden of proof. The other assignments all deal with practically the same question, that is, whether the removal of the manufacturer's packages or trade-packages from the large shipping case did away with the prohibition of Article 1, Section 10, paragraph 2, of the Federal Constitution against the States' taxing imports and so took the goods out of the protection of that provision.

We will therefore divide the argument into two heads.

I.

AS TO THE BURDEN OF PROOF.

It may be said that this is a mere hypothetical question and of no practical value, since the facts have all been proved. We, however, do not assent to this view, for, if after considering the evidence there should be any doubt whatever, that doubt should be resolved against the party on whom the burden of proof rested to prove his case.

Now, applying the universal rule that the burden of proof is on the party who claims to be exempt from the operation of a particular law (in this case, paragraph 2 of Section 10 of Article 1 of the Constitution of the United States), it is clear that so soon as it was established that the goods

assessed were imports, the burden was shifted to the City to show that plaintiffs had done some act after importation which destroyed the distinctive character of the goods as imports and *exempted* it from the constitutional prohibition against the States' taxing imports. In other words, the City claiming to be exempt from the constitutional prohibition, because the goods, when assessed, had lost their distinctive character as imports (an affirmative) by reason of an act or of acts done by the importer (another affirmative) must show these facts.

It was not incumbent on plaintiffs to show that the goods had not lost their distinctive character as imports. The goods are presumed to retain their original character until proof to the contrary. Hence the burden is upon the City and she must make out a clear case of *exemption from the constitutional prohibition*, and any doubt must be resolved in favor of plaintiffs.

II.

The question to be considered under the remaining assignments of error, 3 to 12 inclusive, is: When do goods imported from abroad become liable to taxation by the State?

Under the provision of the Federal Constitution prohibiting the States from taxing imports, it is clear that they cannot be taxed so long as they retain their distinctive character as imports, and hence, in order to solve the question, we must

ascertain what acts destroy their character as imports.

As was stated by Chief Justice Marshall, in Brown vs. Maryland, 12 Wheat. 442, the leading case on this subject, no fixed rule can be formulated that would be of universal application. Each case must be determined by its own peculiar facts. But the learned Chief Justice laid down this general rule: "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has perhaps lost its distinctive character as an import and has become subject to the taxing power of the State; but while remaining the property of the importer in his warehouse in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition of the Constitution."

The use of the expression "original package" was merely illustrative, the true test being whether the imported goods had been mixed up with the general property of the State. And this test has been applied ever since by this and other Courts, although the words "original package" have been so generally used that the cases have become known as the "original package" cases.

The License cases, 5 Howard, pp. 575–6.

Leisy vs. Hardin, 135 U. S. 113.

Schallenberger vs. Penn, 171 U. S. p. 1.

Collins vs. New Hampshire, ib. p. 30.
In re Ware, 58 Fed. R. 783.
In re Spain, 47 Fed. R. 208.
State vs. Goetze, (S. C. of Appeals of W. V.) 27 S. E. R. 225.

It is admitted by the learned counsel for defendant in error that the goods would not have been subject to taxation by the State if the packages as put up at the foreign factories had been shipped separately to plaintiffs, but he contends that, as many of these packages were enclosed together in a large wooden case, the goods became liable to State taxation as soon as the packages were taken out of the case and put on the shelves of plaintiffs' store, although the wooden case was used solely for the convenience of shipment and the packages themselves were never broken or opened.

On the other hand, we claim that the goods were not taxable so long as they remained in plaintiffs' hands in these packages, which were the packages as put up at the foreign factories for the trade; that the goods could not be taxed until the manufacturer's package or trade-package was broken, or opened, or sold, in which latter case they would become at once subject to taxation as the property of the purchaser.

The question then to be decided is narrowed down to this: Did the mere removal of the manufacturer's packages from the wooden case wherein they were placed solely for the convenience of

shipment and to lessen the cost of transportation, incorporate the goods with the mass of property of the State and so destroy their distinctive character as *imports* within the meaning of paragraph 2 of section 10 of Article 1 of the Constitution of the United States as to render them subject to the taxing power of the State ?

The Supreme Court of Louisiana answered this question in the affirmative upon the ground that the wooden case and not the manufacturer's package was the "original package."

The Court did not take into consideration the fact that the wooden case was not a commercial package, for plaintiffs never sold the goods by the case, but only by the package in which they were put up by the foreign manufacturer for the trade and in which they were intended to be sold. The manufacturer's package is the trade-package, for that is the form in which the goods are intended for sale and is the original package of imports within the meaning of the various decisions, the outer casing being used only as a protection against damage and for the convenience of handling and to lessen freight. And it seems to us that Chief Justice Taney so thought when he used the following language in the License Cases, 5 H. 575 : "And while they [goods imported] are in the hands of the importer for sale, in the form and shape in which they were introduced, *and in which they are intended to be sold*, they may be regarded as merely *in transitu*, and on their way to the

distant cities, villages and country for which they are destined and where they are expected to be used and consumed, and for the supply of which they were in truth imported. And a tax upon them while in this condition, for State purposes, whether by direct assessment or indirectly by requiring a license to sell, would be hardly more justifiable in principle than a transit duty upon merchandise when passing through a State. A tax in any shape upon imports is a tax on the consumer, by enhancing the price of the commodity. And if a State is permitted to levy it in any form, it will put it in the power of a maritime importing State to raise a revenue for the support of its own government from citizens of other States, as certainly and effectually as if a tax was laid openly and without disguise as a duty on imports. Such a power in the State would defeat one of the principal objects of forming and adopting the Constitution."

The main purpose of prohibiting the States from laying any duty on imports was to put all the States, the sea-bordered and the inland States, on the same footing, for prior to the adoption of the Constitution certain "States having fine harbors imposed unlimited tax on all goods reaching the continent through their ports." Cook vs. Penn., 97 U. S. 574. To effect this purpose the prohibition must be absolute and unqualified, so long as the goods retain their identity as imports and remain separate from other property of the State.

And as was stated in Brown vs. Maryland, and approved by all the later decisions on the subject, the right to import carries with it the right to sell the goods free from all burdens except what might be imposed by the United States. And the right to sell must mean the right to sell the goods in the form in which they are put up abroad for sale, otherwise the right would be valueless to the importer. Knowing the importer to be a merchant the manufacturer puts up the goods in packages of the size and kind customary to the trade in the particular article, because that is the form in which the goods are intended to be sold in the market where the importer is engaged in business. But when the manufacturer is about to ship the goods put up in such packages, it then becomes necessary to transport them to this country at the least possible cost, and this is in the interest of the consumer particularly, for any additional cost must eventually fall on him. To this end the manufacturer procures a box just large enough to contain the number of packages intended for a particular shipment; puts the packages in it, marks it with the proper address and forwards it to its destination. But this outer box or shipping case is in no sense a trade-package, for the goods are never sold by such box or case, and the removal therefrom of the manufacturer's packages in no way destroys their identity as imports or incorporates them with the general property of the State, especially where, as in this case, they are put in the

importer's warehouse or store which contains nothing but imports in similar packages, that is to say, in packages just as they were put up at the factory for sale by the importer.

The decision of the Supreme Court of Louisiana gives the State the power to practically nullify paragraph 2 of Section 10 of Article 1 of the Federal Constitution. It puts it in the power of the State to absolutely dictate to the importer how he must have his goods shipped in order to retain the benefit guaranteed by the Constitution.

If the State may say to the importer: "You must have the manufacturer's packages shipped one by one or I will tax the goods," the importer would be obliged to have the packages put up differently and the expenses of transportation would be greatly increased.

The goods could no longer be put up in paper wrappings and paste-board boxes, as is customary, but each package would have to be made fit for transportation, that is, practically damage-proof, which alone, leaving out of consideration the extra freight that would naturally be charged, would probably add more to the cost of the goods than the tax would be. And thus placed between two evils and being driven to the necessity of choosing the lesser, the importer would be compelled to pay an unjust tax, for it is to his interest and to the interest of the consumer in particular for whose benefit the States were prohibited from laying a tax on imports, that the goods should be sold as

cheaply as possible. Such an arbitrary exercise of power on the part of the State is not only repugnant to paragraph 2 of Section 10 of Article 1 of the Constitution but is equally repugnant to paragraph 3 of Section 8 of said Article, which gives Congress the power to regulate commerce with foreign nations. How is the State any more concerned with how the packages should be temporarily encased for shipment than with the kind of vessel to which they should be delivered for transportation? If the State can require that each package shall be shipped separately, then it seems clear to us that it could with equal propriety say that the goods must be shipped by an English vessel, or by a German vessel, or by a French vessel, or in a steam vessel or a sailing vessel. And no one would have the boldness to assert that any such arbitrary power rests in the State.

We submit that the goods when assessed had not been incorporated or mixed up with the general property of the State and had not lost their distinctive character as imports; that the manufacturer's package, which was the trade-package, and not the wooden box which was a mere shipping case, is the original package of imports within the meaning of the Constitution.

The assessment of the stock in trade is therefore unconstitutional and the assessment of the "bills receivable" which consisted wholly of sums due on account of sales of said stock is for the same reason unconstitutional.

The judgment of the Supreme Court of Louisiana should be reversed.

Respectfully submitted,

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